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THE SOCIETY OF LEGAL SCHOLARS INTERNATIONAL LAW SECTION AND THE  
THE BRITISH INSTITUTE OF INTERNATIONAL  
AND COMPARATIVE LAW

Eighteenth Conference on Theory and International Law

The Relationship between International Humanitarian Law and International Human Rights Law

*Fragmentation, lex specialis and the tensions in the jurisprudence of the European Court of Human Rights*

Bill Bowring, Birkbeck College

## Introduction

This paper sketches what is in all probability a heretical view, developing arguments to be found in my book (2008)<sup>1</sup>, and in my chapter in the collection edited by Phil Shiner and Andrew Williams<sup>2</sup>. As in those chapters, I draw on my own experience taking Kurdish (from 1994 to 1999) and then Chechen (from 2000 to the present) cases to the European Court of Human Rights (ECtHR). What I now attempt is to radicalise those arguments, on the basis of the materialist and historicised account of international law and human rights for which I contend.

In short, I argue that the *lex specialis* doctrine as developed in particular by the International Court of Justice, in the 1996 *Nuclear Weapons*<sup>3</sup> and 2004 *Wall*<sup>4</sup> Advisory Opinions, and the 2005 *DRC v Uganda*<sup>5</sup> case is an example of a category error, so far as it brings human rights law (IHR) and humanitarian law (IHL) into a relationship with each other, for example that of “complementarity”. Chalk is being compared with or even substituted by cheese. Or still worse, the two are being mixed together: chalky cheese is horribly indigestible, while cheesy chalk is no good at all for writing on blackboards

I start with what I consider to be the manifest confusion of the ICJ. I then turn to the concept of “fragmentation of international law” as it impacts on the issue of the relationship of IHR to IHL; and the pay close attention to the purported maxim *lex specialis derogat lege generali*, around

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<sup>1</sup> B Bowring *The Degradation Of The International Legal Order?: The Rehabilitation Of Law And The Possibility Of Politics* (Abingdon: Routledge Cavendish, 2008) (Abingdon: Routledge Cavendish, 2008), Chapter 4, “After Iraq: International Law in Crisis”, pp.69-98

<sup>2</sup> B Bowring “How will the European Court of Human Rights deal with the UK in Iraq? Lessons from Turkey and Russia” in Phil Shiner and Andrew Williams (eds) *The Iraq War and International Law* (Oxford: Hart Publishing) pp.285-312

<sup>3</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory opinion, 1996 I.C.J. (July 8) at para 25

<sup>4</sup> Legal Consequences of the Construction of a Wall in the Occupied Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9) at para 106;

<sup>5</sup> Case Concerning Armed Activities on the Territory of the Congo (DRC v Uganda) 2005 I.C.J. 116 (Dec 19), at paras 216-217

which there now appears to be a consensus of sorts. Third, I outline what are for me the key differences between IHL and IHR. Finally, I illustrate my position in contrast to a number of contemporary scholars: Schabas, Droege, Hampson, Abresch, Quenivet, and Orakhelashvili. My conclusion is that the European Court of Human Rights has in this matter at least, consciously or not, chosen the correct path in dealing with cases which have come before it, especially the Chechen cases.

### **The confusion of the ICJ**

Perhaps the most glaring example of the ICJ's confusion is to be found in the following well-known passage from the *Wall* case:

106. More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.

I agree with the ICJ that human rights obligations do not cease in the case of armed conflict, whether international or internal, save where there has been a formal derogation under Article 4 of the ICCPR or Article 15 of the European Convention on Human Rights (ECHR). The ICJ's error lies, I contend, in treating IHR and IHL as commensurable "branches of international law".

This passage has given rise to varying interpretations. In her 2005 study for the UN Sub-Commission, Françoise Hampson<sup>6</sup> commented that this passage makes it "clear that *lex specialis* is not being used to displace [human rights law]. It is rather an indication that human rights bodies should interpret a human rights norm in the light of [the law of armed conflict]." With all due deference to her, this is to compound the category error. She may well agree with Noam Lubell, who notices that IHL and IHR appear to be quite different languages: teaching IHL to human rights professionals or discussing human rights law to military personnel can seem like speaking Dutch to the Chinese or vice versa.<sup>7</sup> But interpreting Dutch in the light of Chinese might prove a fruitless operation.

### **Fragmentation and the Chechen cases**

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<sup>6</sup> F Hampson and I Salama 'Working paper on the relationship between human rights law and humanitarian law' Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 53rd session, Doc E/CN.4/Sub.2/2005/14, 21 June 2005

<sup>7</sup> N Lubell, 'Challenges in applying human rights law to armed conflict' (2005) 87:860 *International Review of the Red Cross* 737-754, at 744.

For the same reasons, it is, I contend, wrong to describe the tension between IHL and IHR as a case of fragmentation. There is no unity there in the first place to be fragmented. And in a recent analysis of trends in the politics of international law, Martti Koskeniemi has described the alleged fragmentation in the following terms:

Recent debates of global governance and especially international law's fragmentation have well demonstrated the emergence and operation of structural bias. Through specialization – that is to say, through the creation of special regimes of knowledge and expertise in areas such as 'trade law', 'human rights law', 'environmental law', 'security law', 'international criminal law', 'European law', and so on – the world of legal practice is being sliced up in institutional projects that cater for special audiences with special interests and special ethos. The point of creating such specialized institutions is precisely to affect the outcomes that are being produced in the international world. Very little is fully random out there, as practising lawyers know very well, directing their affairs to those institutions where they can expect to receive the most sympathetic hearing.<sup>8</sup>

It is most certainly true that practitioners decide on the best tribunal for their clients in the way Koskeniemi describes. Prior to the public hearing at the ECtHR of the first six Chechen cases against Russia<sup>9</sup>, the applicants' lawyers argued between themselves as to whether it would assist their clients, the victims of gross violations of the right to life and other ECHR rights, to refer to or to rely upon the jurisprudence of the International Criminal tribunal for the former Yugoslavia (ICTY). They decided – rightly – not to.

I explain in detail below why I think there are such profound differences between IHL and IHR, and why treating IHR and IHL simply as two branches of the law like any others, for example contract law or criminal law, is mistaken.

### ***Lex specialis***

The question arises whether the applicants ought – or were in some way required - to have argued IHL. I contend that this question is based on greater confusion still: that is, with regard to the supposed *lex specialis* doctrine.

Martti Koskeniemi, in his Report for the International Law Commission<sup>10</sup>, analysed the “two ways in which law may take account of the relationship of a particular rule to general one.”<sup>11</sup> In

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<sup>8</sup> M Koskeniemi “The Politics of International Law – 20 Years Later” v.20 n.1 (2009) *European Journal of International Law* 7-19, at p.9

<sup>9</sup> These were: the bombing of the civilian refugee column in October 1999: *Isayeva, Yusupova and Bazayeva v Russia*, (App nos 57947/00, 57948/00 and 57949/00); the massacre in the Staropromyslovskiy district of Grozny: *Khashiev and Akayeva v Russia* (App nos 57942/00 and 57945/00); and the indiscriminate bombing of the village of Katyr-Yurt in February 2000: *Isayeva v Russia* (App no 57950/00). Judgments of 24 February 2005

<sup>10</sup> M Koskeniemi *Fragmentation of international law: difficulties arising from the diversification and expansion of international law: Report of the Study Group of the International Law Commission* (2007) Helsinki: The Eric Castren Institute Research Reports 21/2007; and (2006) International Law Commission A/CN.4/L.682, of 4 April 2006, at <http://daccessdds.un.org/doc/UNDOC/LTD/G06/610/77/PDF/G0661077.pdf?OpenElement>

<sup>11</sup> Koskeniemi (2007) *ibid*, para 88, p.49

his view, the application of a genuine *lex specialis* would be the case of a *modification, overruling or setting aside* of the general rule. He referred to the Commentary to Article 55 of the draft articles on responsibility of States for international wrongful acts, which explained that:

“(4) For the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions: there must be some actual inconsistency between them, or else a discernable intention that one provision is to exclude the other.”<sup>12</sup>

However, referring to the *Neumeister* case<sup>13</sup> he asserted that *lex specialis* will be applicable even in the absence of direct conflict between two provisions, where it might be said that both apply concurrently.<sup>14</sup>

He asked:

“Or what to say of the place of *lex specialis* in the *Legality of the Threat or Use of Nuclear Weapons* case (1996)? Here the ICJ observed that both human rights law (namely the International Covenant on Civil and Political Rights) and the laws of armed conflict both applied “in times of war”. Nevertheless, when it came to determine what was an “arbitrary deprivation of life” under Article 6 (1) of the Covenant, this fell “to be determined by the applicable *lex specialis*, namely the law applicable to armed conflict”.<sup>15</sup> In this respect, the two fields of law applied concurrently, or within each other. From another perspective, however, the law of armed conflict - and in particular its more relaxed standard of killing - set aside whatever standard might have been provided under the practice of the Covenant.”

His conclusion was that the maxim *lex specialis derogat lege generali* refers to a “standard technique of legal reasoning... its power is entirely dependant on the normative considerations for which it provides articulation: sensitivity to context, capacity to reflect State will, concreteness, clarity, definiteness.” It follows that the maxim “cannot be meaningfully codified.” It follows, and I agree with him, that there can be no question of compulsion.

### **Some differences between IHL and IHR**

At the most superficial level IHL and IHR have much in common. Both are bodies of law ratified by states and binding on states. In both cases there are large multilateral treaties, ratified by most states. But there the similarity ends.

I start by pointing out some significant differences between the law of armed conflict and humanitarian law.

The first relates to history.

<sup>12</sup> J. Crawford *The International Law Commission's articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002), p.307

<sup>13</sup> *Neumeister v Austria* Judgment of 7 May 1974, ECHR Series A (1974) No.17, p.13, para 29

<sup>14</sup> Koskeniemi (2007) *ibid* para 91, p.50-1

<sup>15</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory opinion, I.C.J. Reports 1996* p. 240, para. 25.

IHL is far older than IHR. It is to be found at the beginning of recorded history, on the earliest recorded interactions between polities.<sup>16</sup> IHR on the other hand did not exist in any form before the 18<sup>th</sup> century, in the declaration and bills of the French and American Revolutions.<sup>17</sup> Even then, it formed part of domestic, constitutional law rather than international law, and was only emerged in international law after World War I.

The second concerns the character of the normative structures themselves. IHL is, I assert, intrinsically conservative, taking armed conflict as a given, as indeed it always has been in human society. Prior to the Red Cross codification, IHL was known as “the laws and customs of war”. There is on the other hand no such pre-history for IHR, which is in principle and has always been revolutionary, scandalous in its inception, inspired by collective action and struggle, and threatening to the existing state order.<sup>18</sup>

The third follows from the second, and relates to the nature of the redress provided. Breaches of IHL call for action by one state against another, as in the *DRC v Uganda* case<sup>19</sup>; or, as with the Geneva Conventions, punishment of “grave breaches” carried out by individuals. The individuals concerned must be investigated and prosecuted by states, or more recently by bodies created by states, through the agency of the Security Council or treaty bodies. In either case, the actor seeking redress is the state or its surrogate. The victim has no standing as such. Despite having been established by private actors, the International Committee of the Red Cross is a mediator between states, or, as in Additional Protocol II, non-state actors with the capacity to control territory. I emphasise that while by virtue of the Geneva Conventions states bind themselves to “respect and ensure respect” for the conventions, the mechanism of enforcement is primarily that of international criminal law.

IHR is the diametrical opposite. It is the province of individual complaint, before the Second World War to national courts, and following WW II to treaty bodies and mechanisms in which states, and not individuals, are brought to account. However it must be emphasised that the initial claimants of first generation rights were the revolutionary movements against absolutism in the 18<sup>th</sup> century; those of the second generations were typically trade unions and other social

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<sup>16</sup> See for example J Ober “Classical Greek Times” in M Howard, G. Adreopoulos and M Shulman (1994) *The Laws of War: Constraints on Warfare in the Western World* (New Haven, Yale University Press), pp.12-26

<sup>17</sup> In this I concur with Alastair MacIntyre in his *After Virtue: A Study in Moral Theory* (2<sup>nd</sup>ed, London: Duckworth, 1990 (1985))

<sup>18</sup> See B Bowring (2008) *ibid*, Chapter 6 “A substantive account of human rights” pp.111-118; and B Bowring “Misunderstanding MacIntyre on Human Rights” in Kelvin Knight and Paul Blackledge (eds) *Revolutionary Aristotelianism: Ethics, Resistance and Utopia*, special issue of *Analyse & Kritik*, (2008), v.30 n.1 pp.205-214; and also published under the same title (Stuttgart: Lucius & Lucius, 2008); B Bowring pp.205-214; and response to this chapter by MacIntyre at pp.272-3

<sup>19</sup> Case Concerning Armed Activities on the Territory of the Congo (*DRC v Uganda*) 2005 I.C.J. 116 (Dec 19)

movements, whose struggles attained legal recognition with the creation of the International Labour Organisation in 1919. And those of the third generation were, as is well known, peoples, notably colonised peoples fighting for their independence. The first and most important of the rights of the third generation is the right of peoples to self-determination, finally recognised in common Article 1 of the 1966 International Covenants on human rights.<sup>20</sup>

It is at this point IHL has been profoundly marked by developments in IHR. The anti-colonial struggles were largely aimed at securing independence within defined, overseas, territories – that is, the so-called ‘salt-water self-determination’, in respect of territories separated from the colonial metropolis by seas and oceans, the territories to which the UN declaration of 1960 was directed.<sup>21</sup> The non-state protagonists were the ‘national liberation movements’.<sup>22</sup> That was the period, up to the collapse of the USSR, when the use of force by self-determination movements – National Liberation Movements – was not, as is so often the case today, characterised as ‘terrorism’.<sup>23</sup>

Until 1977, when two Additional Protocols were promulgated (AP I and AP II), there was no successful attempt to update the rules of conduct of hostilities from those contained in the Geneva Conventions of 1949 so as to take account of use of force in the cause of self-determination, as Hampson and Salama point out<sup>24</sup>. They suggest that ‘this may have been partly attributable to the reluctance, after both the first and second world wars, to regulate a phenomenon which the League of Nations and later the United Nations were intended to eliminate or control.’<sup>25</sup> However, this is to downplay the significance of the Protocols.

It is of course the case, that, as they note, AP I dealt with international armed conflicts, updating provisions on the wounded and sick, and formulating rules on the conduct of hostilities, while AP II dealt, for the first time, with high-intensity non-international armed conflicts. In this, they follow Doswald-Beck and Vit  , in whose view the most important contribution of AP I ‘is the careful delimitation of what can be done during hostilities in order to spare civilians as

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<sup>20</sup> See the key collection, which awakened my own interest in international law, J Crawford (ed) *The Rights of Peoples* (Oxford, Clarendon Press, 1988); and Chapter 1 “Self-determination – the revolutionary kernel of international law”, pp.9-38 in Bowring (2008) *ibid*

<sup>21</sup> UN General Assembly Res 1514(XV) (14 December 1960).

<sup>22</sup> See the excellent analysis of the legal issues, J Faundez, ‘International Law and Wars of National Liberation: Use of Force and Intervention’ (1989) 1 *African Journal of International and Comparative Law* 85; HA Wilson, *International Law and the Use of Force by National Liberation Movements* (Oxford, Clarendon Press, 1990)

<sup>23</sup> See G Andreopoulos “The Age of National Liberation Movements” in Howard et al 1994 (*ibid*). pp.191-213; and B Bowring “Positivism versus self-determination: the contradictions of Soviet international law” in Susan Marks (editor) *International Law on the Left: Re-examining Marxist Legacies* (Cambridge: Cambridge University Press, 2008), pp.133-168

<sup>24</sup> For a useful brief summary of the history of IHL see note 16 in Hampson & Salama, n 4, at 25-6.

<sup>25</sup> Hampson & Salama, n 4, fn 16, at 26.



much as possible.’<sup>26</sup> However, of a number of scholars recently publishing on the tension (or clash) between IHR and IHL, only William Abresch recognises that the Additional Protocols aimed to extend the reach of the existing treaties governing international conflicts to internal conflicts: ‘thus, Protocol I deemed struggles for national liberation to be international conflicts’<sup>27</sup>. In other words, if an armed conflict is a struggle for national liberation against ‘alien occupation’ or ‘colonial domination’ it is considered an ‘international armed conflict’ falling within AP I.<sup>28</sup>

This, I suggest, is the key to understanding the significance of both Additional Protocols. They were the response of the ICRC, and then the overwhelming majority of states which have ratified the Protocols, to the new world of ‘internationalised’ internal conflicts, in the context of armed struggle for self-determination by National Liberation Movements. In this way the international legal recognition of the right of peoples to self-determination impacted directly on IHL.

### **How contemporary scholars deal with these differences**

The heretical nature of my contention may be highlighted by an examination of the writings of a number of contemporary scholars, exercised in various ways by the relationship between IHL and IHR.

I suggest that the differences I outlined above are much more profound than the differences proposed, for example, by William Schabas in his recent article.<sup>29</sup> Schabas submits that the *lex specialis* and “belt and suspenders” (that IHL and IHR are additive in nature) approaches “are predicated on the idea that there is a fundamental compatibility between the two systems.” On the contrary, he argues, these two theories “overlook a fundamental difference in conception between the two systems, namely the attitude they take to aggressive war.”<sup>30</sup> He points out that IHL is predicated on an indifference to the origin of the conflict, whereas IHR “has suggestions within it, albeit hesitant and underdeveloped, that aggressive war is itself a violation.” This he terms a “human right to peace.”

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<sup>26</sup> L Doswald-Beck, and S Vité, ‘International Humanitarian Law and Human Rights Law’ n 293 (1993) *International Review of the Red Cross* 94-119, at 9.

<sup>27</sup> W Abresch, ‘A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya’ (2005) 16 *EJIL* 741, 742.

<sup>28</sup> Additional Protocol I, Article 1(4), and see Abresch, n 38, at 753.

<sup>29</sup> William Schabas “Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum” (2007) v.40 *Israel Law Review* Special Issue: Parallel Applicability of International Humanitarian Law and International Human Rights Law, pp.592-613

<sup>30</sup> Schabas, *ibid*, p.593

That is a persuasive argument, and contains a degree of truth. Schabas is right: IHL presumes that armed conflict is taking place, and for that reason expects that there will be civilian casualties when force is used. Of course, civilians may not be directly targeted.

This aspect of IHL is well illustrated by the Rome Statute of the International Criminal Court. This creates war crimes of “intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities”<sup>31</sup>, and “intentionally directing attacks against civilian objects”<sup>32</sup>. But the intentional launching of an attack “in the knowledge that incidental loss of life or injury to civilians...” (which includes an attack launched by a reckless perpetrator<sup>33</sup>) is only a war crime where such loss of life or injury is “clearly excessive in relation to the concrete and direct military advantage anticipated.” This has been explained, for example in the Australian military manual, as “so excessive as to clearly indicate wilful intent or wanton disregard for the safety of the civilian population.”<sup>34</sup>

Thus, in order to convict a military officer or indeed a political leader of the respective war crimes the prosecutor must be able to prove a high degree of recklessness. This is in practice extremely difficult: the tendency will be always to pay deference to the judgment of responsible commanders.

The IHR regime is quite different. The presumption is that the State will take the utmost care to protect the lives of civilians. In order to benefit from the derogations in Article 2 (right to life) of the ECHR, the State has the heavy burden of proving that the use of force was “no more than absolutely necessary” in “action lawfully taken for the purpose of quelling a riot or insurrection.”<sup>35</sup> Thus, in *Isayeva*, the Court concluded as follows:

“The Court considers that using this kind of weapon in a populated area, outside wartime and without prior evacuation of the civilians, is impossible to reconcile with the degree of caution expected from a law-enforcement body in a democratic society... The massive use of indiscriminate weapons stands in flagrant contrast with this aim and cannot be considered compatible with the standard of care prerequisite to an operation of this kind involving the use of lethal force by State agents”<sup>36</sup>.

In spite of the evidence that the military became aware that civilians were attempting to leave the village to escape from the fighting, the Court found that “no document or statement by the

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<sup>31</sup> Article 8(2)(b)(i), p.130 in K Dörmann and others *Elements of War Crimes under the Rome Statute of the International Criminal Court* (Cambridge: Cambridge University Press, 2003)

<sup>32</sup> Article 8(2)(b)(ii), p.148 in Dörmann et al, (2003) *ibid*.

<sup>33</sup> See Dörmann et al, (2003) *ibid* p.165: “... there seemed to be agreement between States that this.. should not lead to the result of exonerating a reckless perpetrator who knows perfectly well the anticipated military advantage and the expected incidental damage or injury, but gives no thought to evaluating the possible excessiveness of the incidental injury or damage.”

<sup>34</sup> Dörmann et al (2003) *ibid*, p.172

<sup>35</sup> Article 2(2)(c)

<sup>36</sup> *Isayeva v Russia*., para. 191.

military refers to an order to stop the attack or to reduce its intensity”<sup>37</sup>. It also rejected the finding of the Russian Government military experts' report of 11 February 2002 that the actions of the operational command corps were legitimate and proportionate to the situation<sup>38</sup>.

The outcome could not have been more different than that which could have been achieved under IHL. The State failed to discharge the burden placed on it by the standards and principles of IHR. This result was not the product of the application of even an implied “human rights to peace”. This great achievement of the French and American Revolutions has the effect of placing real limitations on what a State can do in peacetime. And in order to benefit from the existence of a state of war, the Russian State would have had to derogate from the ECHR pursuant to Article 15 of the ECHR; and the derogation itself may be challenged in the ECtHR.<sup>39</sup>

Similarly, I contend that my account has far more substance than the account usually given by contemporary scholars of the difference between IHR and IHL. Take for example that provided by Cordula Droege, a Legal Adviser in the ICRC.<sup>40</sup>

She asserts that “Modern human rights can be traced back to the visionaries of the Enlightenment who sought a more just relationship between the state and its citizens.” Tom Paine was I think a bit more radical, as was Robespierre. I suggest that such a formulation neglects entirely the Battle of Yorktown in 1781 or the storming of the Bastille in 1789. Robespierre famously declared that “If the spring of popular government in time of peace is virtue, the springs of popular government in revolution are at once virtue and terror: virtue, without which terror is fatal: terror, without which virtue is powerless.”<sup>41</sup>

For Droege, “Humanitarian law, for its part, was primarily based on the reciprocal expectations of two parties at war and notions of chivalrous and civilised behaviour. It did not emanate from a struggle of rights-claimants, but from a principle of charity – “inter arma caritas”.” This is better – but was it not the case when Cromwell confronted the defenders of Drogheda in 1649, that the contemporary laws of war were clear: if surrender was refused and a garrison was taken by an assault, then the lives of its defenders would be forfeit? Geoffrey Parker cites Henry V’s

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<sup>37</sup> *Ibid.*, para. 196.

<sup>38</sup> *Ibid.*, para. 198.

<sup>39</sup> See *Brannigan and McBride v UK*, App Nos. 14553/89 ; 14554/89, judgment of 26 May 1993

<sup>40</sup> Cordula Droege “The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict.” (2007) v.40 *Israel Law Review* Special Issue: Parallel Applicability of International Humanitarian Law and International Human Rights Law, pp.310-355

<sup>41</sup> See Slavoj Žižek (ed) (2007) *Virtue and Justice: Maximilien Robespierre* (London:Verso); and for an analysis of American revolutionary thought, Michael Hardt (ed) (2007) *The Declaration of Independence* (London: Verso)

brutal speech to the besieged burghers of Harfleur in the 1590s as imagined by Shakespeare<sup>42</sup>, and notes that this remained true in the 18<sup>th</sup> century. The Duke of Wellington wrote later that “I believe it has always been understood that the defenders of a fortress stormed have no claim to quarter.”<sup>43</sup> This is hardly a principle of charity; or was at least a yawning exception to it.

Droege goes on: “Considerations of military strategy and reciprocity have historically been central to its development. And while human rights were an internal affair of states, humanitarian law, by its very nature, took its roots in the relation between states, in international law.” This gets much closer to the heart of the matter.

### **Is there a “new merger” between IHL and IHR? The Chechen cases again**

More recently, Noelle Quenivet (whose PhD supervisor was Francoise Hampson) has co-edited a book suggesting that there is a “new merger” between IHL and IHR.<sup>44</sup> As Quenivet puts it in her introduction: “At the heart of the enquiry is whether the two bodies of law, IHL and IHR have finally merged into a single set of laws.”<sup>45</sup>

She cites with approval Cerna’s remark<sup>46</sup> that IHL “evolved as a result of humanity’s concerns for the victims of war, whereas human rights law evolved as a result of humanity’s concern for the victims of a new kind of internal war – the victims of a new kind of internal war – the victims of Nazi death camps.” It will be plain from my remarks above that, *pace* Cerna, this is as far from what actually happened as could be the case. I repeat that laws and customs of war have accompanied the use of armed force since the beginning of history, while human rights are much more recent, but pre-existed the Holocaust.

In her own chapter in her collection, commenting on the Chechen cases, Quenivet asserts that the Strasbourg Court “never assessed whether military operations conducted by state authorities were carried out in order to gain a military advantage. This is certainly linked to the fact that the very notion of military advantage is one encapsulated in IHL, and is therefore beyond the legal

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<sup>42</sup> *Henry V* act 3, scene 3, lines 7-18

<sup>43</sup> See Geoffrey Parker “Early Modern Europe” in M. Howard et al (eds) (1994) *ibid* Chapter 4, pp.40-58, p.48, citing Wellington to Geoffrey Canning, 3 February 1820 in *Despatches, Correspondence and Memoranda of Field Marshall Arthur, Duke of Wellington* (Millwood, NY: Kraus Reprint, 1973), 1:93

<sup>44</sup> R Arnold and N Quenivet (eds), (2008) *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Leiden: Martinus Nijhoff Publishers)

<sup>45</sup> Arnold and Quenivet, (2008) *ibid*, p.1

<sup>46</sup> In C Cerna “Human Rights in Armed Conflict: Implementation of International Humanitarian Law Norms by Regional Intergovernmental Human Rights Bodies” in F Kalshoven and Y Sandoz (eds) *Implementation of International Humanitarian Law* (Brill, 1989), 31, 34

remit in which the [Court] assesses violations of the ECHR.”<sup>47</sup> She concludes: “Without explicitly recognising that it is appraising the compliance of states with the core principles of IHL in non-international armed conflicts, the [Court] is in fact referring to the main principles of the *lex specialis* .”<sup>48</sup> and further: “What is remarkable is that the Court applies the detailed provisions applicable in times of international armed conflict to situations of non-international armed conflict.” I hope I have shown in the preceding passages that the Court would very likely have reached a quite different result if it had been confronted with applying IHL to individual commanders. The ECtHR was able to make the findings of fact it did precisely because it was applying different standards within a very different conceptual framework.

William Abresch on the other hand, believes that the ECtHR has applied the doctrines it has developed on the use of force in law enforcement operations (for example by the police), to high intensity conflicts involving large numbers of insurgents, artillery, and aerial bombardment.<sup>49</sup> He correctly observes that for lawyers trained and practising within IHL the law of international armed conflict would be the ideal proper law for internal armed conflict. He calls this an ‘internationalizing trajectory’.<sup>50</sup> However, he contends that the ECtHR has broken from such a trajectory, in order to derive its own rules from the ‘right to life’ enshrined in Article 2 of the ECHR. His prognosis is that:

given the resistance that states have shown to applying humanitarian law to internal armed conflicts, the ECtHR’s adaptation of human rights law to this end may prove to be the most promising base for the international community to supervise and respond to violent interactions between the state and its citizens.<sup>51</sup>

He therefore continues to believe that IHL is the proper law to be applied to situations such as the Chechen (or the Kurdish) conflicts.

He is in reality therefore not so far from Hampson, who clearly considers that the Strasbourg Court should take IHL into account, and believes that despite the fact that the Court has never referred to the applicability of IHL, ‘there is an awareness of the type of analysis that would be conducted under IHL.’<sup>52</sup> In this she follows the ‘classical’ model of Doswald-Beck and Vit  , who considered that ‘the obvious advantages of human rights bodies using [IHL] is that [IHL]

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<sup>47</sup> N Quenivet “The Right to life in International Humanitarian Law and Human Rights Law” in R Arnold and N Quenivet (eds), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Leiden, Martinus Nijhoff Publishers, 2008), pp.331-353, 341

<sup>48</sup> N Quenivet, *ibid*, p.353

<sup>49</sup> W Abresch, ‘A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya’ (2005) 16 *European Journal of International Law* 741, at 742.

<sup>50</sup> at 742.

<sup>51</sup> Abresch (2005) *ibid* at 743.

<sup>52</sup> Hampson & Salama (2005) *ibid*, at 18

will become increasingly known to decision-makers and the public, who, it is hoped, will exert increasing pressure to obtain respect for it.’<sup>53</sup> Similarly, Aisling Reidy, who was one of the lawyers in the Kurdish cases, together with Hampson and the present author<sup>54</sup>, considered that in the Turkish cases the Strasbourg Court was ‘borrowing language from [IHL] when analysing the scope of human rights obligations. Such willingness to use humanitarian law concepts is encouraging.’<sup>55</sup> She too saw this development as ‘certainly welcome in so far as it contributes to a stronger framework for the protection of rights.’<sup>56</sup> I disagree. I cannot see how the use of the alien framework of IHL in such a case would be “encouraging”.

I can illustrate these points by further reference to the Chechen cases at the European Court of Human Rights.<sup>57</sup> These were cases brought by individual Chechen “victims” against the Russian Federation. There could have been an inter-state case, and perhaps should have been; but this would still have been a complaint of violation of individual rights. The Chechen applicants in many ways spoke for the whole of their people. Their objective in the proceedings was not to obtain monetary compensation. What they wanted was the vindication, at the highest level, of the truth of their account of what had happened to them and to the mass of Chechens. At this level Russia’s right to sovereign action was at stake.

One by-product – entirely contingent as it happens – of the judgments in their favour, was the naming in the case of *Isayeva v Russia*, which concerned the indiscriminate bombing of the village of Katyr-Yurt in February 2000<sup>58</sup> of senior Russian officers, General Shamanov and General Nedobitko, in the context of findings of fact which amount to the commission of war crimes. That places their investigation with a view to prosecution firmly on the agenda. In their submissions to the Council of Europe’s Committee of Ministers on compliance with the judgments in October 2005<sup>59</sup>, the applicants argued that “these two officers were found to have been responsible for a military operation which involved the “massive use of indiscriminate weapons” and which led, *inter alia*, to the loss of civilian lives and which has been found to have violated Article 2 of the European Convention on Human Rights. The applicants submit

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<sup>53</sup> L Doswald-Beck, and S Vit , ‘International Humanitarian Law and Human Rights Law’ n 293 (1993) *International Review of the Red Cross* 94-119 at 108.

<sup>54</sup> See B Bowring (1996) “The Kurds of Turkey: Protecting the Rights of a Minority” in Kirsten Schulze, Martin Stokes, Colm Campbell (eds) *Nationalism, Minorities and Diasporas: Identities and Rights in the Middle East* (London: I. B. Tauris)

<sup>55</sup> A Reidy, ‘The approach of the European Commission and Court of Human Rights to international humanitarian law’ (1998) *International Review of the Red Cross* 513, at 521.

<sup>56</sup> *Ibid* at 521.

<sup>57</sup> References for the first six cases are given above

<sup>58</sup> App no 57950/00

<sup>59</sup> See [http://www.londonmet.ac.uk/library/i81669\\_24.doc](http://www.londonmet.ac.uk/library/i81669_24.doc); and for the process of enforcement of the Chechen judgments as a whole, see <http://www.londonmet.ac.uk/research-units/hrsj/affiliated-centres/ehrac/ehrac-litigation/chechnya---echr-litigation-and-enforcement/enforcement-of-chechen-judgments.cfm>

that in the light of the Court's findings..., criminal proceedings should be opened in respect of both of them.”<sup>60</sup>

Moreover, the successful – in my view – application of IHR to internal armed conflict gives the lie to Greenwood's judgment that war is “far too complex and brutal a phenomenon to be capable of being constrained by rules designed for peacetime.”<sup>61</sup>

Finally, I turn to the recent work of Alexander Orakhelashvili.<sup>62</sup> He notes “interdependence” of IHR and IHL as explained by the ICJ in the *Wall* case, and “parallelism” as displayed in the *Congo-Uganda* case. He cites the *Kunarac* case for the proposition that IHR and IHL are “mutually complementary”<sup>63</sup> and that “their use for ascertaining each other's content and scope is both appropriate and inevitable.”<sup>64</sup>

He comments in detail on the first six Chechen cases<sup>65</sup>, and concludes that “the European Court's approach allows it to secure the legal outcome required under both human rights law and humanitarian law, even though it does not directly apply the provisions of the latter body of law, as norms falling outside its competence.”<sup>66</sup> This, I respectfully submit, is quite wrong. I have sought to show above that the defendant(s), the burden and standard of proof, and the evidential issues, would have been quite different had IHL been the proper body of law for these cases.

His conclusion, with which I also disagree, is that “the Court's approach should be based, as it mostly is, on the implicit application of the standards of humanitarian law, albeit cloaked in the Convention-specific categories of legitimacy, necessity and proportionality.”<sup>67</sup> I return to the metaphor of chalk and cheese: these categories have an entirely different origin and content from those of IHL.

## Conclusion

As I signalled in my introduction, it is my view that the European Court of Human Rights has in this matter at least, consciously or not, chosen the correct path in dealing with cases which have

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<sup>60</sup> At paras 28 to 31, and 36 to 40

<sup>61</sup> C Greenwood “Rights at the Frontier: Protecting the Individual in Time of War” in B Rider (ed) *Law at the Centre* (Kluwer Law International 1999) p.277, 293

<sup>62</sup> A Orakhelashvili “(2008) The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?” v.19 n.1 *European Journal of International Law* 161-182; and A Orakhelashvili “The Interaction between Human Rights and Humanitarian Law: A Case of Fragmentation” *International Law and Justice Colloquium*, New York University, 26 February 2007, at [iilj.org/research/documents/orakhelashvili.pdf](http://iilj.org/research/documents/orakhelashvili.pdf)

<sup>63</sup> IT-96-23-T; Judgment of 22 February 2001, para 467

<sup>64</sup> Orakhelashvili (2008) *ibid*, p.164

<sup>65</sup> At pp.170-174

<sup>66</sup> Orakhelashvili (2008) *ibid*, p.174

<sup>67</sup> Orakhelashvili (2008) *ibid*, p.174

come before it, especially the Chechen cases. Of course, the Court is of course perfectly capable of dramatic wrong turnings, as when it mistakenly eliminated the content of democracy in *Zdanoka v Latvia*<sup>68</sup> or helped to create in Kosovo, through its judgments in *Behrami* and *Saramati* “a legal black hole over which there is no independent human rights supervision.”<sup>69</sup> Part of the problem is that the ECtHR has only a limited understanding of the historical significance of the body of law upon which it adjudicates. But if I am right as to the specificity and revolutionary content of IHR, then perhaps it is the law itself which ensures that the ECtHR, in some of its judgments at least, is capable of rising to the occasion.

6,526 words, including footnotes

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<sup>68</sup> See B Bowring “Negating Pluralist Democracy: The European Court Of Human Rights Forgets the Rights of the Electors” (2007) 11 *KHRP Legal Review* pp.67-96, at <http://www.bbk.ac.uk/law/about/ft-academic/bowring/negatingpluralistdemocracy>

<sup>69</sup> See M Milanovic and T Papic “As Bad As It Gets: The European Court’s *Behrami* and *Saramati* Decision and General International Law” (2009) v.58 pt.2 *International and Comparative Law Quarterly* pp.267-296, at 295